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No. 90-1818

In The

Supreme Court of the United States

October Term, 1991

MITZI BEVERS,

Petitioner,

v.

CAMILLE DeLOACH,

Respondent.

Petition For Writ Of Certiorari United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner[1] respectfully submits this reply to address matters that respondent's brief indicates may be in need of clarification. In some instances, it would appear that respondent simply did not read the Petition, and "clarification" is relegated to a footnote[2]; in other instances, clarification is appropriate because respondent either read and understood a given point, but answered with a lack of candor, or read but missed the point. This would not be the first occasion of misperception, which helps explain respondent's argument that petitioner is now asserting issues never before raised, or raised, but not preserved.

Using the question of the effect of Camille DeLoach's bindover as an example, we state to this Court that were

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[1] Where appropriate, petitioner may also be referred to as defendant, or detective, and respondent as plaintiff, or Camille DeLoach.

[2] At page 7, respondent maintains: "petitioner urges that the Tenth Circuit impermissibly extended the *Malley* decision by allowing a civil rights plaintiff to recover simply because of omissions from the affidavit of probable cause." We believe the following from page 10 of the Petition to be too clear to have been misconstrued, if read: "We have no problem with the Tenth Circuit's adoption of the rule that liability may attach when an officer prepares an affidavit in such a way as to make it sound as if probable cause existed, when the officer knew or should have known probable cause in fact did not exist, whether that pretense be accomplished by what is said or what is left unsaid."

In like vein, respondent's footnoted remark that we failed to comply with Rule 14's requirements is bizarre in light of the first three paragraphs of the Petition, on pages 1 and 2.

the record before it, that record would reflect at least the following occurring in the trial court:

* On June 1, 1988 defendant filed her brief in support of her motion for summary judgment, in which she argued, inter alia:

> "Given the fact the District Court of Oklahoma County subsequently found probable cause sufficient to bind plaintiff over for trial on the charge, the affidavit must be taken as a correct statement of probable cause. A state court judge, charged with the function of issuing search and arrest warrants when state law crimes are alleged to have been committed, found as a matter of fact and law that there was probable cause for warrant to issue. A state court judge, charged with the function of judicially determining whether probable cause for the charge to be tried existed, found as a matter of fact and law that there was probable cause for plaintiff to stand trial as charged.
>
> Those determinations are not subject to collateral attack in this court; the judicial determination of probable cause is an absolute bar to this action. *Easton v. City of Boulder*, 776 F.2d 1441 (10th Cir. 1985); see also *Williams v. Kobel*, 789 F.2d 463 (7th Cir. 1986) and *Friedman v. Village of Skokie*, 763 F.2d 236 (7th Cir. 1985). (It should be noted that the *Williams* court so held even though plaintiff, as the defendant in the criminal action, was not bound over at preliminary hearing.)"

* Defendant then supplemented that brief on June 14, 1988 with evidentiary materials, including excerpts from the transcript of plaintiff's preliminary hearing, and a cover explanatory brief pointing out to the trial court that plaintiff was bound over, after the court heard a number of witnesses during a lengthy process, on the ruling: "And your demurrer is again overruled. Those questions

that now exist are questions to be resolved by a jury. I find there's probable cause to believe the crime of Murder in the First Degree was committed in Oklahoma County by Camille DeLoach. She's bound over for trial on that charge."

* Pursuant to an order of the trial court entered June 30, 1988, defendant filed another supplementation of the motion for summary judgment, on July 5, 1988, pointing out that the trial court had assumed, incorrectly, that defendant's argument was premised on "mere judicial authorization" for issuance of the warrant. Defendant reurged: "On the contrary, this was a full-blown preliminary hearing conducted by a state court judge for two days which obviously transpired *after* another judge of the court had determined that warrant for the arrest of plaintiff would issue . . . "

* Defendant's brief in support of her motion for JNOV, filed August 29, 1988, reads in pertinent parts: "When counsel received the Court's Order of August 15, 1988, [overruling, on the eve of trial, defendant's motion for summary judgment], the case of *Williams v. Kobel*, 789 F.2d 463 (7th Cir. 1986) was promptly [again] called to the Court's attention." We then quoted that court's ruling: "the actual probable cause to bindover determination made by the state judge at a preliminary hearing before the criminal trial employs a stricter standard of proof, including evidentiary rulings, than a review of the officers' actions and the probable cause to arrest." Defendant then concluded that portion of the JNOV argument:

> "Defendant believed and still believes that *Easton v. City of Boulder*, 776 F.2d 1441 (10th Cir. 1985) was persuasive, if not dispositive, of the above issues, as well as *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), both of which were brought

> to the Court's attention early in summary judgment briefing, but brought *Williams* to the Court's attention because here Defendant has a far stronger case since Plaintiff was in fact bound over. Thus, a state court judge, employing a stricter standard than governs this Defendant, found probable cause to believe an offense had been committed. ***This Court consistently misconstrued Defendant's position on this issue as being that she should somehow share judicial immunity. That never was Defendant's point. Defendant's point was that the judicial determination of probable cause was a bar to this action.*** See, in addition to *Williams, Easton and Myers, Kompare v. Stein*, 801 F.2d 883 (7th Cir. 1986) in which the Court held:
>
> > 'A finding of probable cause is an absolute defense to an action for prosecution without probable cause.' (At p. 891.)
>
> As the *Williams* Court said, this is so 'regardless of the lack of good faith of the arresting police officer.' "(At p. 470.)" [The emphasis in the above is supplied for the convenience of this Court.]

We have gone on at some length because the allegation respondent has made is a serious one. The demands for the attention of this Court have increased exponentially, yet the time that can be afforded has not; accordingly, this Court has noted that it is essential that its energies not be squandered on petitions for certiorari that are infirm. E.g., *City of Canton*, 489 U.S. 378 (1989); *City of St Loūis v. Praprotnik*, 485 U.S. 112 (1988). This petitioner is not asking this Court to decide questions as if it were a court of first impression, but rather to resolve issues as a court of last resort. We hope our prayer before this Court has become more succinct and more articulate, (although that should not, in any court, hinge on whether estoppel is called a bar, or issue preclusion, or a rose). A want of

improvement through the briefing process would be cause for concern. This Court has said "it should not be surprising" that arguments were "much less detailed" in the courts below. *Praprotnik*, at p. 120. We have never given up on this proposition, and indeed, on June 29, 1989, (some six months before the Tenth Circuit would render its decision), defendant brought two cases to the court's attention, as permitted by Rule 28(j) of the Rules of Appellate Procedure. One of those cases was *Adamson v. Dayton Hudson Corp.*, a copy of which was provided to the court, since it had been published in the Oklahoma Bar Journal only five days earlier. *Adamson*, 774 P.2d 478 (Ok.App. 1989), stands for the proposition that a plaintiff is precluded from relitigating the issue of probable cause in a civil case, that issue having been decided adversely to her at her preliminary hearing, despite a subsequent acquittal.

As for respondent's allegation that the issues of the reach of *Malley* and the law on retaliation were also not preserved, nor even raised, the space constraints of a reply dictate that we note briefly that the record would reflect this is equally inaccurate.[3] Defendant consistently

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[3] In addition to complaining that petitioner has not preserved certain general issues, respondent charges that petitioner raises here for the first time the argument that the Tenth Circuit has erroneously expanded upon *Malley* and has relied upon cases decided after Camille DeLoach's arrest. We fail to understand how we could have done so before the Tenth Circuit issued its opinion. The petition for rehearing dealt, for several pages, with the misapplication of *Malley* by the Tenth Circuit. We do concede that we did not raise in the petition for rehearing the fact that the Tenth Circuit relied upon cases decided after the incident in question. The significance of that

(Continued on following page)

maintained that *Malley*, appropriately applied, would entitle her to qualified immunity, and raised that argument at every opportunity before trial, including in the motion for summary judgment, her trial brief, and her brief filed on August 2, 1988 in support of a motion for directed verdict, and the brief in support of motion JNOV. And in that latter brief, defendant addressed the First Amendment issue as well:

> "As for a First Amendment violation, we can only wonder where, when and how this court perceived one and where, when and how the evidence warranted an instruction on one (which the court in any event did not give, apart from a vague reference in instruction number 17C). How very telling in light of *Anderson's* admonition that a plaintiff not be able to subvert qualified immunity by claiming violations 'of extremely abstract rights.' (At p. 3039) See *Hansen v. Meese*, 675 F.Supp 1482 (ED Va. 1987). Noting that: 'Plaintiff also attempts to argue that his arrest was somehow rendered unreasonable by the fact that the Defendants arrested him with a retaliatory motive', the court remarked:
>
> > '[U]nder *Anderson*, this Court must ask whether a reasonable officer could have believed Plaintiff's arrest to be lawful in

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fact simply did not manifest itself at the time. We are still not certain what the significance of that fact is, although we believe that *Procunier v. Navarette*, 434 U.S. 555 (1978), at pp. 563-564 does suggest that the court of appeals ought not to have relied upon later cases to determine whether the law was clearly established at the time the purported §1983 violation occurred. It has simply struck us, now, as odd that the Tenth Circuit speaks on the one hand of well-established principles, and yet cites, on the other, very recent decisions, and decisions which furthermore post-dated this arrest.

> light of clearly established Fourth Amendment principles and the knowledge that Defendants possessed at the time of the actions at issue, not whether the right to be free from retaliation for constitutionally protected activity is clearly established.' (At footnote 4.)"

Petitioner respectfully maintains that the record will establish that grant of this petition would not be improvident.[4]

We turn our attention now to respondent's misperception that what we ask of this Court is a rehearing on the facts. What we ask of this Court is a determination that the lower courts erred by failing to evaluate the

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[4] Respondent suggests that since she and her attorneys have got their money, this case has lost all importance, and thus the Petition wastes this Court's time and should be denied. The principles at risk are still not only important to one of the parties, but also to amici curiae, below, the Attorney General of Oklahoma, on behalf of the State of Oklahoma, and the Americans for Effective Law Enforcement, Inc., on behalf of Americans for Effective Law Enforcement Inc., the International Association of Chiefs of Police Inc., the National District Attorneys Association, the National Sheriffs Association, and the Oklahoma Association of Chiefs of Police. Petitioner notes Justice Rehnquist's separate opinion in *Graddick v. Newman*, 453 U.S. 929, 945 (1981) in which he commented: "Since property transferred or money paid involuntarily pursuant to a judgment can be recovered, execution of the lower court's judgment pending appeal normally does not render the case moot", citing the case respondent relies upon, among other Supreme Court cases. Plaintiff executed on the supersedeas bond over Defendant's objection and Defendant's requests to both the trial court and the appellate court for a stay were denied. Defendant was mindful of the Supreme Court law that suggests that an application for stay to a single justice of this Court when the lower courts have denied a stay is futile. Indeed, *Graddick* itself states that proposition. (At p. 933.)

detective's affidavit and her conduct in the light of the totality of the circumstances. It is "the totality of the circumstances" that is supposed to inform probable cause determinations. *Illinois v. Gates*, 462 U.S. 213 (1983). To say that the Tenth Circuit ignored all of the facts is not to ask this Court to rehear the facts.

We know we come before this Court with the facts decided[5] and so we assume that Dr. Stuemke told the detective and the district attorney in their one meeting, not only that as a general rule parents and not babysitters are the abusers, but that in his opinion the blow that killed this baby was probably struck earlier. It is a fact that her affidavit does not recite that opinion, and the Tenth Circuit deemed that omission a fatal flaw. But it is also true that the attending neurosurgeons had a contrary opinion, and the affidavit truthfully summarizes it. Having seen little Ryan's brain oozing from his skull, they never changed their minds that the blow was instantaneously immobilizing, not even in their testimony at the preliminary hearing, not even in their testimony at the trial of this case. Since it is a fact that Ryan was conscious when he was delivered into plaintiff's care,

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[5] Defendant does not concede the truthfulness of the "facts" recited by respondent in her "Statement of the Case". This is not a "fact fight" and we are not going to waste space here attempting to tackle the innuendo and the red herrings. We will simply note that again, we would stand on the record, and the record will not reflect that this detective ever admitted in her deposition, or elsewhere, that she knew probable cause did not exist. (She did know that the first time the district attorney declined charges, he was of opinion there was not substantial evidence to convict.)

how can a reasonable person say that a reasonable detective would have decided to make her affidavit a compilation of conflicting medical opinions? How can a reasonable person say that no reasonable detective would have concluded that there was probable cause to believe that, since Ryan was conscious when he was delivered into plaintiff's care, and since the attending neurosurgeons were convinced that the massive blow would have rendered the baby unconscious immediately, it was Camille DeLoach who struck that massive blow?

This detective interviewed everybody who might cast light on this investigation – not just three people. A waitress at the restaurant where Ryan and his mother had supper the night before his death told her the child was fine. Where did that fact figure into the Tenth Circuit's analysis?

The Tenth Circuit did not evaluate the affidavit in light of the totality of the circumstances. It looked only at the omission. Had the totality of the circumstances been the governing standard, as it ought to have been, the omission could not reasonably have been interpreted as vitiating probable cause.

At the preliminary hearing, the state court judge looked at the totality of the circumstances and thus, had he been advised that Dr. Stuemke was of the opinion the child might have been struck earlier, he would have reached the conclusion he reached and bound Camille DeLoach over. How could he have done otherwise, on the strength of the testimony from the attending physicians and other witnesses that he listened to for two days! The Tenth Circuit never looked to the circumstances before the court at the preliminary hearing, but rather just flatly held that the detective defrauded that court, despite the

fact that court still would have concluded: "those questions that now exist are questions to be resolved by a jury. I find there's probable cause [to bind Camille DeLoach over]."

In other words, petitioner is not asking this Court to retry this case. Petitioner is asking this Court to apply the "totality of the circumstances" rule and hold that neither the omission from the affidavit nor the detective's testimony at the preliminary hearing was outcome determinative of the reality of the existence of probable cause.

Swinging to the other end of the spectrum, respondent accuses petitioner of inviting this Court to reverse *Malley*. This is as inaccurate as to suggest petitioner is asking this Court to decide facts. Petitioner has consistently maintained, in the trial court, the appellate court, and here, that it is right and proper that *Malley* continue to control situations where a police officer submits an affidavit in which probable cause is "cooked", whether because the officer lies or conceals the truth, and that the officer should not be insulated from liability merely because that affidavit is slipped past an overworked magistrate. To apply that principle to this situation is to abrade *Malley's* parameters and to abuse long-standing precedent on probable cause determinations.

Respectfully submitted,

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